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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

ANDREW C. FINK,

Plaintiff and Respondent,

v.

COST U LESS CARS, INC.,

Defendant and Respondent;

JOHN DUMAS ROCHELLE,

Appellant.

C085383

(Super. Ct. No. SCV0037114)

Appellant John Dumas Rochelle appeals from an order directing him to pay \$10,000 in attorney fees and costs along with a \$500 penalty. The order was included as part of an order relieving his former client from default judgment under the mandatory relief provision of Code of Civil Procedure section 473.¹ We will affirm.

¹ Undesignated statutory references are to the Code of Civil Procedure.

BACKGROUND²

On January 8, 2016, Andrew Fink brought suit against Cost U Less Cars, Inc. (Cost U Less) for several causes of action, including breach of contract and a Consumers Legal Remedies Act violation. On May 9, 2016, Fink obtained an entry of default against Cost U Less.

On May 22, 2016, Cost U Less attempted to move in pro. per. to set aside the default. The motion was denied on July 27, 2016, without prejudice; the trial court explained a corporation cannot defend an action without an attorney.

Around that same time, Cost U Less retained Rochelle to represent it. On November 28, 2016, a prove-up hearing was held, and a default judgment was subsequently entered against Cost U Less.

On April 26, 2017, Cost U Less, now represented by new counsel, moved under section 473, subdivision (b) to set aside the default and default judgment. The motion included a declaration of Rochelle. Rochelle represented that after trying unsuccessfully to obtain a stipulation to set aside the default or to settle the case, he told Cost U Less he would prepare a motion to set aside the default. But he failed to prepare and file the motion before the November 28, 2016 prove-up hearing. He attested, “Neglecting to file the Motion to Set Aside the default prior to the default prove-up hearing was excusable neglect.”

On June 29, 2017, the trial court granted the motion to set aside the default and default judgment. It concluded the failure to challenge the default and entry of judgment

² The parties copiously refer to facts without citation to the record. “[A]llegations by the parties which are not supported by appropriate reference to the record will be disregarded.” (*Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal.App.4th 477, 485.)

was directly attributable to Rochelle’s neglectful actions, and therefore the default and entry of judgment were subject to relief under section 473, subdivision (b).

The court ordered Rochelle to pay Fink \$10,000 in attorney fees and costs to cover the “unnecessary fees and costs associated with” Rochelle’s neglectful actions. It also imposed a \$500 penalty to the State Bar Client Security Fund.

DISCUSSION

I

Rochelle’s Challenge to the Mandatory Relief Ruling

On appeal, Rochelle contends the trial court should have granted relief under either the discretionary provision of section 473, subdivision (b), or under section 473.5, subdivision (a), neither of which require the court to order legal fees and costs. We disagree.

A. Trial Court Properly Granted Relief Under Section 473’s Mandatory Provision

Section 473, subdivision (b) offers both discretionary and mandatory relief from default. (*Gee v. Greyhound Lines, Inc.* (2016) 6 Cal.App.5th 477, 484 (*Gee*).) The mandatory provision offers relief for a wider range of attorney conduct than the discretionary provision and includes inexcusable neglect. (*Id.* at p. 492.) Mandatory relief requires an attorney’s sworn affidavit attesting to his “mistake, inadvertence, surprise, or excusable neglect.” (§ 473, subd. (b).) Once the prerequisites for mandatory relief exist, the trial court lacks discretion to refuse relief. (*Gee*, at p. 484; § 473, subd. (b) [The court “shall” vacate any default when the application is timely, in proper form, and accompanied by an attorney’s sworn affidavit, unless the court finds the default was not caused by the attorney’s mistake, inadvertence, surprise, or neglect].)

That is what happened here. Cost U Less filed a motion satisfying the prerequisites for mandatory relief—including Rochelle’s signed declaration admitting neglect. The trial court was therefore obligated to grant relief under the mandatory provision. (See *Gee, supra*, 6 Cal.App.5th at p. 484.) As such, the relief granted was not

error.³ If Rochelle believed he was not at fault or that discretionary relief was available, he could have opted not to sign the declaration and assume the risk that discretionary relief might not be granted. (See *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839 [“The additional, more specific purposes of section 473[, subdivision] (b)’s provision for relief based on attorney fault is to ‘relieve the innocent client of the burden of the attorney’s fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits’ ”]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 5:291, p. 5-77 [“[I]n close cases where relief might otherwise be denied and an attorney affidavit of fault is factually available, you will probably want to file an attorney affidavit in order to assure relief (and avoid possible malpractice claims)”].)

B. Trial Court Did Not Err in Not Ruling on Section 473.5

Rochelle also argues the court should have granted relief under section 473.5, which allows relief for “lack of actual notice.” He reasons, when Cost U Less filed its pro. per. motion to set aside, a Cost U Less representative wrote that Cost U Less had never been properly served with the complaint. We find no error.

Here, the motion to set aside default and default judgment did not seek relief under section 473.5. Thus, the trial court acted well within its discretion in not granting relief on that basis.

³ Rochelle argues if the trial court was not inclined to grant discretionary relief after the April 26, 2017 motion, it would not have granted such relief before the prove-up hearing, thus Rochelle’s mistake was not prejudicial to Cost U Less. We are unpersuaded. We will not speculate as to how the trial court would have ruled on a motion that was never filed.

II

Rochelle's Challenge to the Amount of Sanctions Awarded

Rochelle next contends the amount of sanctions awarded was erroneous as it was not made “upon any terms as may be just,” as required by section 473, subdivision (b). He avers Fink’s attorney did not provide the court with a memorandum of costs related to the set aside but rather submitted a 10-page timesheet of the entire litigation. He argues the order is not based on reasonable attorney fees and costs related to the set aside. We find no error.

The memorandum Rochelle refers to is not part of the record. Nor is a transcript of the hearing wherein fees were awarded. We therefore decline to blindly speculate as to whether the amount ordered was proper. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [“It is the burden of the party challenging the fee award on appeal to provide an adequate record to assess error”].)

III

Rochelle's Due Process Challenge

Finally, Rochelle contends the order violated due process for lack of a statement of reasons justifying the amount of sanctions ordered. He adds that at the June 29, 2017 motion hearing, Fink’s attorney failed to provide a proper memorandum of costs, giving the impression that the amount Rochelle was sanctioned was arbitrary and punitive. He is mistaken.

When awarding attorney fees under section 473, “due process requires that the court provide the party with a written statement of reasons for the award when the fees are imposed as ‘sanctions.’ ” (*Hearst v. Ferrante* (1987) 189 Cal.App.3d 201, 204.) Here, however, the costs and attorney fees were imposed not as sanctions but to defray costs incurred by Fink due to Rochelle’s neglectful conduct—as required by statute. Regardless, the order provided a written statement of reasons: it recounted Rochelle, by admission, failed to move to set aside the default prior to the prove-up hearing, a failure

directly attributable to Rochelle’s neglectful actions. As a consequence, Cost U Less faced “a substantial default judgment through no fault of its own,” and Fink incurred \$10,000 in unnecessary fees and costs.

As to what Fink’s attorney provided at the June 29, 2017 hearing, the record is silent.

IV

Fink’s Request for Attorney Fees

Fink separately requests an award of attorney fees. He notes he has brought suit under the Consumers Legal Remedies Act, and that act provides for “court costs and attorney’s fees to a prevailing plaintiff in litigation filed pursuant to this section.” (Civ. Code, § 1780, subd. (e).) However, at this stage of the proceedings, Fink is not a prevailing party. (See *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153 [“ ‘plaintiffs may be considered ‘prevailing parties’ for attorney’s fees purposes if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit” ’ ”].) Fink is, however, entitled to recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

DISPOSITION

The judgment is affirmed. Fink shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

/s/
Blease, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Duarte, J.